

PUBLIC PROSECUTOR

v.

AHMAD NADZARI ISMAIL

HIGH COURT MALAYA, KOTA BHARU

SULEIMAN HASHIM JC

[CRIMINAL TRIAL NO. 47(58)-5-1988]

16 OCTOBER 1991

EVIDENCE: Charge under Dangerous Drugs Act 1952 - Weight of the cannabis unknown - Whether certification made by chemist - Sufficient evidence beyond reasonable doubt - Whether such inference can be drawn.

EVIDENCE: Onus - Onus of proof on the prosecution - Whether further evidence sufficient to secure conviction - Sections 6, 12(2)(3), 37(da)(vi), 39, 39A(1), (2), 39(B)(1)(a), (2), Dangerous Drugs Act 1952.

At the close of the case for the prosecution, the charge was amended to one under s. 12(2)(3) of the Dangerous Drugs Act 1952 and the accused pleaded guilty and was sentenced to three years imprisonment from date of arrest. The Public Prosecutor now appeals.

The defence had challenged the weight of the cannabis and the onus of proof beyond reasonable doubt on the issue with regards the weight of the cannabis was thus cast upon the prosecution, the weight being an ingredient, indeed a material ingredient in the original charge. The prosecution did not discharge this onus and the weight remained unknown.

The weight being unknown the presumption under s. 37(da)(vi) could not arise. Also ss. 39A(2), 39A(1) both of which require the weight to be known became not applicable. Applicable were ss. 39, 12(2), (3) and s. 6, this being a case of possession.

In the present case, the issue before the Court was whether, it was sufficient, when the chemist certified that the weighing machine was in good condition and accurate before each weighing. Can the Court draw such an inference, as in *Wahab b. Abdullah's* case.

Held:

[1] There is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found. In the present case there was no 'specific fact' that the SP1 had checked or calibrated the weighing machine as to its accuracy and found it correct, neither could I draw such inference from any fact 'specifically found'.

[2] According to ss. 102 and 103 of the Evidence Act, if the party with whom the onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.

[3] With respect in the present case the onus of proof beyond reasonable doubt of the weight of the cannabis was on the prosecution and with respect the evidence given by the chemist was not sufficient to discharge this onus beyond reasonable doubt and the weight of the cannabis remained unknown.

[Accused pleaded guilty and sentenced to three years imprisonment from date of arrest.]

Cases referred to:

PP v. Wahab b. Abdullah [1991] 1 MLJ 218 (foll)

PP v. Maarif [1969] 2 MLJ 65 (foll)

Munusamy a/l Vengadasalam v. PP [1987] CLJ (Rep) 221 (cons)

International Times v. Leong Ho Yuen [1980] 2 MLJ 86 87 (foll)

a Legiskation referred to:

Dangerous Drug Act 1952, ss. 6, 12(2), (3), 37(da)(vi), 39, 39A(1), (2)

Weights and Measures Act 1972, s. 11

Weights and Measure Regulation 1981, reg. 45

For the accused - Mohamed Apandi Bin Ali; M/s. Apandi Ali & Co.

For the prosecution - Mohd. Amin Firdaus Bin Abdullah

b**JUDGMENT****Suleiman Hashim JC:**

The accused was charged:

c

Bahawa kamu pada 31 Januari 1988, jam lebih kurang 11.15 pagi di Kampong Kubang Palas Luar, Palekbang, di dalam daerah Tumpat, di dalam Negeri Kelantan telah didapati di dalam milik kamu dadah berbahaya iaitu ganja "Cannabis" seberat 2,972.5 gram untuk diperedarkan oleh kamu sendiri dan oleh itu kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952, dan boleh di hukum di bawah s. 39B(2) Akta yang sama.

d

At the close of the case for the prosecution I amended the charge to one under s. 12(2)(3) of the Act, the accused pleaded guilty and I sentenced the accused to three years imprisonment from date of arrest. The Public Prosecutor now appeals.

e

The defence had challenged the weight of the cannabis and with respect I think the onus of proof beyond reasonable doubt of the weight of the cannabis was thus cast upon the prosecution, the weight being an ingredient, indeed a material ingredient in the original charge. The prosecution did not discharge this onus and the weight remained unknown.

The weight being unknown the presumption under s. 37(da)(vi) could not arise. Also s. 39A(2), s. 39A(1) both of which require the weight to be known became not applicable. Applicable were s. 39, s. 12(2) and s. 6, this being a case of possession.

Encik Mohan a/l Gangadharan (SP1) the chemist was asked during cross-examination:

f

S. Macam mana En. Mohan membuat timbangan-timbangan ini samada untuk daun-daun kering atau untuk bamboo slivers, fibres, thread.

J. I got the gross weight by taking the 12 bundles and putting them on the weighing machine and I got the gross weight of 434.6 grammes. Similarly with the said particles and bamboo slivers, fibres and rubber bands.

S. Apakah jenis nama alat timbangan ini.

J. Ohaus.

S. Alat timbangan ini disahkan oleh mana-mana Jabatan Kerajaan.

g

J. It is not required.

S. Alat timbang ini tidak pernah disahkan oleh mana-mana Jabatan Kerajaan.

J. No. But it is not required.

S. Barang-barang di dalam E2, E3, E4 cara yang sama untuk menimbang, membuat analisa.

J. Ya.

S. Semua daun kering E2, E3, E4 ditimbang oleh alat Ohaus yang tidak pernah disahkan oleh mana-mana Jabatan Kerajaan.

h

J. Ya.

S. Barang-barang dalam E3 (P12).

J. E3 (P12) itu contents cannabis given weight 2,027.8 grammes, net weight 1,756.2 grammes.

S. From the 1,756.2 grammes how many grammes taken for chemical analysis.

J. 232 grammes.

S. Macam mana En. Mohan dapat 232 grammes.

i

J. The original net weight minus the weight of cannabis in P14A.

S. Apakah berat P14A.

J. The weight of cannabis remaining was 1,524.2 grammes.

S. En. Mohan menggunakan alat timbang yang sama, yang tadi.

J. Ya.

During re-examination SP1 did say:

S. Bagaimana alat timbang yang En. Mohan menggunakan itu.

J. I certified that the weighing machine was in good condition and accurate before each of my weighing.

With respect SP1 was correct when he replied, "It is not required" in answer to the question:

Alat timbang ini disahkan oleh mana-mana Jabatan Kerajaan,

and again SP1 was correct when he replied:

No. But it is not required.

in answer to the question:

Alat timbang ini tidak pernah disahkan oleh mana-mana Jabatan Kerajaan.

The Weights and Measures Act 1972 and the Weight and Measures Regulation 1981 are applicable only to instruments for weighing or measuring for use for trade and "use for trade" is as defined under s. 11 of the Act. There is reg. 45 which I think did not make mandatory that the instrument for weighing or measuring for the purposes under the Dangerous Drugs Act 1952 be inspected and verified under the Weight and Measures Regulations 1981:

Inspection of instruments 45. Any weight or measure or instrument for weighing or measuring mentioned in reg. 17, not used for trade may be inspected and verified by the Inspector at the request of any person and a certificate of verification in the form prescribed in Schedule 4 shall be issued by such Inspector at the time of stamping every such weight, measure or instrument for weighing or measuring.

For my guidance I studied the case *PP v. Wahab b. Abdullah* [1991] 1 MLJ 218 where a complain was that the chemist:

had failed to state specifically in his oral evidence that he had actually weighed the granular substances.

The Court held:

I could not see no merit in Counsel's argument that there was an obligation on the part of the chemist PW1 to say that he had in fact weighed the granular substances in the 17 plastic packets P1A A1-A17. It could clearly be inferred from PW1's oral testimony that he weighed the contents of all the 17 packets ...

Thus it was sufficient when it could be inferred that the chemist had weighed the contents of all the 17 packets which contents included the granular substances.

In the present case was it sufficient when the chemist said:

I certified that the weighing machine was in good condition and accurate before each of my weighing.

With respect I felt it was not sufficient. The chemist "certified" that the weighing machine was in "good condition" and "accurate" beyond reasonable doubt. Can I draw such inference, as could be drawn in *Wahab b. Abdullah's* case.

a For my guidance I also studied the case *PP v. Maarif* [1969] 2 MLJ 65:

There is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found.

b With respect in the present case I could find no “specific fact” that SP1 had checked or calibrated the weighing machine as to its accuracy and found it correct, neither could I draw such inference from any fact “specifically found.” For my guidance I also studied the case *Munusamy a/l Vengadasalam v. PP* [1987] CLJ (Rep) 221 SC on the nature and scope of evidence a chemist need give. I trust I have not transgressed the judgment in that case and I have not breached the doctrine *stare decisis*.

c For my guidance and indeed binding upon me I also studied the case *International Times v. Leong Ho Yuen* [1980] 2 MLJ 86 FC at 87:

According to ss. 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.

d With respect in the present case the onus of proof beyond reasonable doubt of the weight of the cannabis was on the prosecution and with respect the evidence given by the chemist was not sufficient to discharge this onus beyond reasonable doubt and the weight of the cannabis remained unknown.

Also found at [1992] 2 CLJ 868

e

f

g

h

i